U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 08 July 2003

Case No. 2001-BLA-1196

In the Matter of:
PAUL VARNEY,
Claimant,

v.

KENTUCKY CARBON CORPORATION,
Employer,
and
LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,
and

DISTRICT DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Clarissa Friend, Esq.
On behalf of Claimant

Gretchen Gullett, Esq.
On behalf of Employer/Carrier

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code

of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[1]

On September 12, 2001, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 17).[2] A formal hearing on this matter was conducted on April 15, 2003, in Pikeville, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:

1. Whether the miner worked as a miner after December 31, 1969;

2. Whether the miner worked at least 33 years in or around one or more coal mines;

3. Whether the Miner has pneumoconiosis as defined by the Act;

4. Whether the Miner's pneumoconiosis arose out of coal mine employment;

5. Whether the Miner is totally disabled;

6. Whether the Miner's disability is due to pneumoconiosis;

7. Whether the evidence establishes a material change in conditions under 20 C.F.R. § 725.309;

8. Whether the named employer is the Responsible Operator; and

9. Whether the named employer has secured the payment of benefits.

(DX 17).

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[1]The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr" refers to the official transcript of this proceeding.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Paul Varney ("Claimant") was born on April 27, 1944. (DX 1). He was 58 years old at the time of the hearing. He married Irene (Smith) Varney on August 9, 1982, and they had remained married at the time of the hearing. (DX 16; Tr. 11). I find that Mrs. Varney is a dependent for purposes of benefit augmentation. Claimant entered the United States Army after finishing the 9th grade. (Tr. 11). He earned his G.E.D. while he was in the Army. (Tr. 11).

In conjunction with his initial application for benefits, Claimant completed a Department of Labor Description of Coal Mine Work and Other Employment form describing the requirements of his work as an electrician. (DX 16). He wrote that he worked as an electrician whenever a piece of equipment was down, which required him to crawl 280 feet, lift a 150 pound buggy tire with the aid of two other men, and to carry his 5 pound bag of tools for 280 feet. Claimant testified that, as a coal miner, he operated a loader, a miner, the cutting machine, and the pinning machine. (Tr. 12). He also worked as a ventilation man, worked on belts, and shoveled coal into a car. (Tr. 12). Regarding the exertional requirements of his various jobs, Claimant testified that he would have to lift an 80-pound bag of rock dust, as well as laying track weighing 120-130 pounds. Claimant completed a second Description of Coal Mine Work and Other Employment when he filed his second application for benefits. This time he described the exertional requirements of his work as a chief foreman/electrician. (DX 3). His position required him to walk the mines to inspect the work and repair equipment. He wrote that he would sit for one hour per day, but that he was mostly on his knees.

Procedural History

Claimant filed his initial application for benefits under the Act on February 12, 1997. After the Office of Workers' Compensation Programs ("OWCP") denied his application, a formal hearing before the Office of the Administrative Law Judges was held. Administrative Law Judge Robert Hillyard issued a decision and order denying benefits on July 7, 1999. He credited Claimant with 27 years of coal mine employment and found that Kentucky Carbon Corporation was the appropriate responsible operator. Administrative Law Judge Hillyard also found that Claimant did not establish the existence of pneumoconiosis or the presence of a totally disabling respiratory or pulmonary impairment. Claimant did not appeal.

On December 4, 2000, Claimant filed a second application for benefits under the Act. The OWCP denied his second application on March 15, 2001, and again on June 26, 2001. Claimant timely appealed both denials. Claimant's application was transferred on September 12, 2001 to the Office of the Administrative Law Judges for a formal hearing. A formal hearing was

scheduled for March 28, 2002, but it was re-scheduled for a formal hearing on April 15, 2003, which the undersigned conducted in Pikeville, Kentucky. At the hearing, both parties agreed to close the record at the hearing and declined to submit closing arguments.

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of §§ 725.494 and 725.495. The District Director identified Kentucky Carbon Corporation as the putative responsible operator on July 12, 2001. (DX 13). I find that Kentucky Carbon Corporation is the employer with whom Mr. Varney spent his last cumulative one year period of coal mine employment and is properly designated as the responsible operator in this case. §725.493(a)(1).

Length of Coal Mine Employment

Mr. Varney was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations. In determining the length of coal mine employment, an administrative law judge may apply any reasonable method of calculation. *See Croucher v. Director, OWCP*, 20 B.L.R. 1-67, 1-72. However, the length of coal mine employment must be computed as provided by § 725.101(a)(32). § 718.301. Under § 725.101(a)(32), a year is defined as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 working days. § 725.101(a)(32) (internal quotation marks omitted). The determination of length of coal mine employment must begin with § 725.101(a)(32)(ii), which directs an adjudication officer to ascertain the beginning and ending dates of coal mine employment by using any credible evidence. If credible evidence establishes that the miner's coal mine employment lasted for a year, it shall be presumed, in the absence of contrary evidence, that the miner spent at least 125 working days in such employment. § 725.101(a)(32)(ii).

In his initial application for benefits, Claimant alleged that he engaged in 32 years of coal mine employment. Employer conceded to at least 20 years of coal mine employment, and Administrative Law Judge Hillyard found that Claimant engaged in 27 years and 7 months of coal mine employment. In connection with his second application for benefits, Employer again conceded that Claimant engaged in at least 20 years of coal mine employment. Claimant testified that he began coal mining in November of 1965 one week after being honorably discharged from the Army and stopped coal mining in May of 1995 when the mine he was working at shut down. (Tr. 12, 13).

Paul Fletcher, personnel manager for Kentucky Carbon Corporation, submitted a letter stating that Claimant was employed by Kentucky Carbon Corporation from December 19, 1972 through May 26, 1983 as a loader operator, rehired on February 13, 1984, and had remained continuously employed through the time the letter was sent on March 4, 1991. In 1991, Claimant was working for Kentucky Carbon Corporation as a roofbolter. On the Employment History form Claimant submitted with his initial application for benefits, Claimant stated that he was a pin machine operator. Claimant's Social Security Earnings records confirm his dates of employment with Kentucky Carbon Corporation. The records show coal mine employment beginning in the

3rd quarter of 1966 and continuing full-time through the second quarter of 1972, except for the 4th quarter of 1969. After leaving Kentucky Carbon Corporation in 1991, Claimant's Social Security Earnings records show full-time coal mining employment through 1994. Craig Smith, controller for Pecks Branch Mining Company, submitted a document stating that Claimant worked for Pecks Branch from June 6, 1991 until March 31, 1992. The records did not show any earnings reported for 1995 or 1996. Except for four quarters of employment for Essex International between 1966 and 1970, Claimant's Social Security Earnings records only indicate coal mine employment. I find Claimant's testimony to be credible. Based on Claimant's testimony and the letter from Kentucky Carbon Corporation, Claimant has definitively established 17 years and 7 months of coal mine employment with Kentucky Carbon Corporation. Additionally, Claimant's testimony, his Social Security Earnings records, W-2 statements, and his UMWA pension documents show 10 more years of coal mine employment. Employer has not presented any evidence to the contrary, nor has Employer alleged that Claimant worked less than 125 days during any 365 day period during which it employed Claimant. In fact, Employer has conceded that Claimant worked at least 20 years as a coal miner. Therefore, I find that Claimant engaged in 27 years, 7 months of coal mine employment.

MEDICAL EVIDENCE

I incorporate by reference, as if fully rewritten herein, the x-ray interpretations, pulmonary function tests, arterial blood gas studies, narrative reports, and hospital records that were summarized and reviewed in Administrative Law Judge Hillyard's decision and order denying benefits dated July 7, 1999.

X-RAY REPORTS

Exhibit	Date of X-ray	Date of Reading	Physician/Qualifications	Interpretation
CX 2	01/05/96		Myers	1/1; film quality 3 (dark)
CX 1[3]	03/24/97	3/30/99	DeGuzman	½ to 2/1

[3]Administrative Law Judge Hillyard considered this x-ray in his decision and order denying benefit. Accordingly, this x-ray interpretation will not be analyzed with the newly submitted evidence.

DX 4	12/20/00	12/20/00	Kendall, BCR[2], B-reader[3]	negative
DX 5	12/20/00	01/06/01	Sargeant, BCR, B-reader	negative
CX 3	08/12/02	10/14/02	Brandon, BCR, B-reader	2/1; film quality 2

An x-ray was taken on June 19, 2000 and interpreted by Dr. Nolan Sakow on June 20, 2000. (CX 2). Dr. Sakow did not read the x-ray for the purpose of diagnosing the presence or absence of pneumoconiosis. His interpretation was not offered in compliance with the quality standards of § 718.102 and Appendix A to Part 718. From the language of the interpretation, I cannot infer whether the x-ray is negative or positive for the existence of pneumoconiosis. Similarly, Dr. Amin offered an interpretation of a May 23, 2000 x-ray on May 24, 2000. He did not interpret the film for the presence or absence of pneumoconiosis, and it was not classified in accordance with § 718.102 and Appendix A to Part 718. I cannot infer whether the x-ray is negative or positive from Dr. Amin's interpretation.

PULMONARY FUNCTION STUDIES

Exhibit/ Date	**Co-op./ Undst./ Tracings**	**Age/ Height**	**FEV_1**	**FVC**	**MVV**	**FEV_1/ FVC**	**Qualifying Results**
CX 1 3/30/99	/ / Yes	54 63"[4]	1.29	1.90	14.7	67%	Yes
DX 4[5] 12/20/00	Good/ Good/ Yes	56 72"	1.61	2.21	33	72%	N/A

[2]A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

[3]A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

[4] I must resolve the height discrepancy recorded on the pulmonary function tests. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). I find that the miner's actual height is 71 inches.

[5]N.K. Burki, M.D., who is board-certified in internal medicine and the subspecialty of pulmonary disease, examined the results of this pulmonary function test and found them to be invalid due to less than optimal effort, cooperation, and comprehension. He commented that the curve shapes indicate suboptimal effort.

DX 4 2/6/01	Good/ Good/ Yes	56 72"	2.85	4.47	107	64%	No

*post-bronchodilator values

ARTERIAL BLOOD GASES

Exhibit	**Date**	**pCO_2**	**pO_2**	**Qualifying**
DX 4	12/20/00	41.4 38.5*	88.6 99.4*	No No

*Results obtained with exercise

Narrative Medical Evidence

Claimant submitted the undated narrative examination report of Ray DeGuzman, M.D. under a cover letter dated February 28, 2002. (CX 1). The examination occurred sometime after April 27, 1998 and before April 27, 1999 because Dr. DeGuzman noted that Claimant was 54 years old at the time of the examination. Dr. DeGuzman considered a 24 year history of coal mining and a smoking history of one pack of cigarettes per day for 20 years. Claimant reported that he has experienced smothering associated with a productive cough and easy fatigue for 19 years. Claimant also reported a back injury that he suffered while mining. Dr. DeGuzman documented pulmonary function tests ("PFT") that Claimant underwent in 1991 and 1999. He interpreted the two PFTs as "pulmonary function tests is coming down very much and it was the last one showing very much pulmonary obstructive of the lungs." Dr. DeGuzman also referred to an x-ray interpretation from March 24, 1997, which he stated showed lung findings compatible with interstitial coal workers' pneumoconiosis of profusion 1/1. Dr. DeGuzman opined, "[i]n my personal opinion that this patient has already 1/2 to 2/1 and q and p." Upon physical examination, Dr. Deguzman found that the color of Claimant's face and fingers appear to be not very healthy. He detected diminished breath sounds transmission and expansion, as well as rhonchi in the mid and upper lungs bilaterally. Dr. DeGuzman then listed the following diagnoses: 1). COPD; 2). coal miners' pneumoconiosis; and 3). ILO (International Labor Organizations) classification q from 1/2 to 2/1. Dr. DeGuzman remarked that "this patient showing a gradual progressive deteriorations of his pulmonary function tests and he will never be going back to any kind of work that requires physical and mental (sic)."

On December 20, 2000, Claimant was examined by Srinivas Ammisetty, M.D., who is board-certified in internal medicine. He completed a Department of Labor Medical History and Examination for Coal Mine Workers' Pneumoconiosis form. Dr. Ammisetty considered a 19-21 year history of coal mine employment as a shuttle car operator and loader, as well as a 35 year history of smoking one-half pack of cigarettes per day. Claimant complained of a cough productive of sputum, wheezing, dyspnea, chest pain, orthopnea, ankle edema, and paroxysmal nocturnal dyspnea. He documented that Claimant was very dyspneic and short of breath even with small movements in his office. Auscultation of Claimant's chest revealed bibasilar inspiratory rales. Dr. Ammisetty submitted Claimant to a chest x-ray, PFT, ABG, and electrocardiogram

("EKG"). He noted that the chest x-ray did not reveal pneumoconiosis. He interpreted the PFT as showing a severe obstructive lung disease. Dr. Ammisetty found the ABG values to be normal. He diagnosed chronic obstructive pulmonary disease ("COPD") based on Claimant's production of sputum. He also diagnosed coronary artery disease. Dr. Ammisetty found that Claimant's cardiopulmonary diagnosis was primarily caused by his coronary artery disease, and secondly by smoking and occupational dust exposure. He opined that Claimant has a severe obstructive lung disease primarily attributed to coronary artery disease and secondarily related to smoking and occupational dust exposure. Furthermore, Dr. Ammisetty marked the box indicating his belief that Claimant suffers from an occupational lung disease caused by his coal mine employment based on Claimant's chronic bronchitis and productive cough. He marked the box indicating that he assessed Claimant's pulmonary disease as severe. He attributed Claimant's pulmonary disease to chronic smoking and occupational dust exposure. Finally, he marked the box indicating his belief that Claimant did not have the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment due to his severe pulmonary impairment caused by chronic smoking and occupational dust exposure.

R.V. Mettu, M.D. performed a PFT on February 6, 2001 and provided a narrative interpretation of the PFT. He found that the spirometry revealed a small airway dysfunction. Dr. Mettu found that Claimant's lung volumes were normal. He also found that Claimant's diffusion capacity is mildly decreased.

Hospital Records and Other Medical Evidence

Claimant was admitted to the Highlands Regional Medical Center of Eastern Kentucky on June 19, 2000 by Rodney Handshoe, M.D.. Claimant presented complaining of chest pain. Dr. Handshoe documented that Claimant's medical history was remarkable for hyperlipidemia x1 year, degenerative joint disease, chronic back pain, peptic ulcer disease, COPD, CWP. He noted that Claimant reports a tobacco abuse habit of one pack per day for approximately 30 years. Dr. Handshoe stated that Claimant was a disabled coal miner secondary to a back injury and CWP. Upon physical examination, Claimant denied current dyspnea and reported that he becomes dyspneic on exertion. Claimant also denied wheezing. Dr. Handshoe detected decreased breath sounds bilaterally with inspiratory rales occasionally with auscultation bilaterally, otherwise no rhonchi or wheezing appreciated. Claimant underwent an echocardiogram, which revealed severe distal septal hypokinesis, opical and inferior apical akinesis, concentric left ventricular hypertrophy, mild TR, tricuspid valve reflects redundant leaflets. A chest x-ray reflected no active heart disease, and an electrocardiogram reflected a probably recent anterior infarction. Claimant was stabilized with medication. He was transferred on June 21, 2000 to a VA facility to receive left heart catheterization as a form of revascularization.

Sandra Owen, a representative of National Respiratory Services, stated in a letter dated February 7, 2002, that Claimant has been receiving nebulizer medication from her company on a monthly basis since 1999. (CX 1). She stated that Claimant receives vials of albuterol and ipratropium.

Smoking History

Dr. Ammisetty documented a smoking history of one-half pack of cigarettes per day for 35 years. Dr. Handshoe noted one pack per day for 30 years. Dr. DeGuzman reported a smoking history of one pack per day for 20 years. At the hearing, Claimant testified that he was no longer smoking. He also testified that he smoked off-and-on for 22 years. At the previous hearing in 1999, Claimant testified that he was still smoking, and that he had been smoking one pack per day for 20 years. Claimant testified consistently. However, I find the account he provided to Dr. Handshoe upon entering the hospital to be the most probative since it was given by Claimant when he was seeking medical treatment after suffering a heart attack. Therefore, I find that Claimant smoked one pack of cigarettes per day for 30 years.

DISCUSSION AND APPLICABLE LAW

Duplicate Claim

Mr. Varney's second application for benefits was filed in December of 2000, more than one year after prior denial of his claim in July of 1999. The provisions of § 725.309 apply to new claims that are filed more than one year after a prior denial. Section 725.309 is intended to provide claimants relief from the ordinary principles of *res judicata*, based on the premise that pneumoconiosis is a progressive and irreversible disease. *See Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990); *Orange v. Island Creek Coal Compamy*, 786 F.2d 724, 727 (6th Cir. 1986); § 718.201(c) (Dec. 20, 2000). Section 725.309(d) provides that:

> If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met.

The Benefits Review Board defined "material change in conditions" under § 725.309(d) as occurring when a claimant establishes, by a preponderance of the evidence developed subsequent to the prior denial, at least one of the elements of entitlement previously adjudicated against the claimant. *See Allen v. Mead Corp.*, 22 B.L.R. 1-61 (2000). The Board has also held that a material change in conditions may only be based upon an element which was previously denied. *Caudill v. Arch of Kentucky, Inc.*, 22 B.L.R. 1-97 (2000) (en banc on recon.) (where Administrative Law Judge found that claimant did not establish pneumoconiosis and did not specifically address total disability, the issue of total disability may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions). Lay testimony alone is insufficient to establish a material change in conditions. *Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122 (1999).

This matter arises under the jurisdiction of the Sixth Circuit Court of Appeals.[6] In *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), the Sixth Circuit held that, under *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), it is insufficient for the ALJ to merely analyze the newly submitted evidence to determine whether an element previously adjudicated against the claimant has been established. An administrative law judge must also compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence is substantially more supportive of claimant. *Kirk*, 264 F.3d at 609.

Mr. Varney's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, the following elements:

1. That he suffers from pneumoconiosis;

2. That the pneumoconiosis arose, at least in part, out of coal mine employment;

3. That the claimant is totally disabled; and

4. That the total disability is caused by pneumoconiosis.

See §§ 719.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore*, 9 B.L.R. 1-4, 1-5 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-212 (1985). Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987). Administrative Law Judge Hillyard previously found that Claimant did not establish the existence of pneumoconiosis, nor the presence of a totally disabling respiratory or pulmonary impairment. In order for Claimant to prevent his duplicate claim from being denied on the basis of the prior denial, and to have eligibility for benefits considered *de novo*, he must adduce new evidence to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment that is substantially more supportive than the evidence he previously submitted.

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

[6]Appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989)(en banc). Miner last engaged in coal mine employment in Kentucky. Appellate jurisdiction lies with the Sixth Circuit Court of Appeals.

> For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

Section 718.201(a).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. The record consists of 4 interpretations of 4 newly submitted x-rays. Dr. Myers found the x-ray dated January 5, 1996 to be positive for the existence of pneumoconiosis. There were no other interpretations offered. Therefore, I find that the x-ray dated January 5, 1996 is positive for the existence of pneumoconiosis. However, this x-ray was taken 3 years before the previous denial of benefits. Therefore, it cannot establish a worsening of Claimant's condition. Drs. Kendall and Sargeant, who are dually-certified as radiologists and B-readers interpreted a December 20, 2000 x-ray as negative for the existence of pneumoconiosis. There were no other interpretations of this x-ray. Therefore, I find that the x-ray dated December 20, 2000 is negative for the existence of pneumoconiosis. Dr. Brandon, who is also dually-certified as a radiologist and a B-reader, interpreted an x-ray dated August 12, 2002 as positive for the existence of pneumoconiosis. I find that the August 12, 2002 x-ray is positive for the existence of pneumoconiosis.

The newly submitted evidence that is able to establish a change in conditions amounts to one negative x-ray from December 20, 2000 and a positive x-ray from August 12, 2002. The Act recognizes pneumoconiosis as a latent and progressive disease that may first become detectable after the cessation of coal mine employment. § 718.201(c). Accordingly, I find that the August 12, 2002 x-ray interpretation is more probative of whether Claimant suffered from pneumoconiosis at the time of the hearing than the x-ray from December 20, 2000. Since the

most recent x-ray was interpreted by a dually-certified physician as positive, I find that the Claimant has established the existence of pneumoconiosis by x-ray evidence under subsection (a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. The newly submitted evidentiary record does not contain any biopsy evidence to consider. Therefore, I find that the Claimant has failed to establish the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Dr. DeGuzman, in a report likely written following a March 30, 1999 examination, opined that Claimant suffered from COPD and CWP. Dr. DeGuzman did not provide an opinion regarding the etiology of Claimant's COPD, and his diagnosis of CWP was based on a March 27, 1997 x-ray. Since there is no opinion regarding the etiology of Claimant's COPD, it cannot serve as a finding of legal pneumoconiosis. Moreover, Dr. DeGuzman's diagnosis of clinical pneumoconiosis is based solely on an x-ray interpretation from 1997. Even if his diagnosis of CWP was well-reasoned and well-documented, it would not be able to establish a material change in conditions since the prior denial of benefits because Dr. DeGuzman relied on evidence developed prior to Administrative Law Judge Hillyard's denial of benefits. In a footnote,

Administrative Law Judge Hillyard commented that Claimant attempted to adduce this opinion of Dr. DeGuzman in support of his first application for benefits. However, Administrative Law Judge Hillyard excluded Dr. DeGuzman's report from the record. I find that Dr. DeGuzman's report does not amount to a well-reasoned and well-documented opinion finding the existence of pneumoconiosis that can be relied upon to establish a material change in conditions since the prior denial of benefits.

Dr. Handshoe followed Claimant during the three days Claimant spent in the Highlands Regional Hospital in June of 2000. He noted that Claimant's medical history was remarkable for the existence of CWP. However, he did not render his own opinion that Claimant suffers from pneumoconiosis. Therefore, his report cannot amount to a well-reasoned and well-documented opinion to establish the existence of pneumoconiosis.

Dr. Ammisetty issued a narrative examination report on December 20, 2000. He opined that Claimant suffered from a severe obstructive lung disease arising in part out of his coal mine employment. He noted that Claimant's x-ray was negative for the existence of pneumoconiosis. Dr. Ammisetty based his opinion on his physical examination, Claimant's subjective complaints, and the PFT that he conducted. He considered an accurate account of Claimant's smoking and coal mine employment history. Dr. Ammisetty set forth clinical observations and findings, and he relied upon adequate data to support his reasoning. The PFT that Dr. Ammisetty conducted was invalidated by Dr. Burki, but Dr. Ammisetty's diagnosis was not solely based on his interpretation of the PFT values. His opinion is well-reasoned and well-documented. I find that Dr. Ammisetty's opinion is entitled to probative weight enhanced by his board-certification in internal medicine.

Dr. Mettu opined performed a PFT on February 26, 2001 and interpreted the results as revealing a small airway obstruction and a mildly decreased diffusion capacity. He did not provide an opinion as to the etiology of the obstruction or decreased capacity. Therefore, his opinion cannot be considered a diagnosis of legal pneumoconiosis.

Dr. Ammisetty's opinion affirmatively establishes that Claimant suffers from a chronic respiratory impairment arising in part of exposure to coal mine dust. Dr. Mettu's opinion confirms Dr. Ammisetty's opinion that Claimant suffers from an airways obstruction. Employer did not proffer any newly submitted evidence to the contrary. Therefore, I find that Claimant has established the existence of pneumoconiosis under subsection (a)(4).

I have determined that the newly submitted evidence establishes the existence of pneumoconiosis by x-ray evidence and narrative opinion evidence. However, in order to establish the existence of pneumoconiosis, the newly submitted evidence must be substantially more supportive. Administrative Law Judge Hillyard relied chiefly on 7 negative x-ray interpretations of 4 different x-rays, which were rendered by dually-certified physicians, in addition to the narrative opinion of Dr. Jarboe. In the prior denial of benefits, the only positive x-ray interpretations were rendered by physicians who held no special credentials for interpreting chest x-rays for the presence or absence of pneumoconiosis. Also, Administrative Law Judge Hillyard attributed little probative weight to the two opinions finding the presence of pneumoconiosis because they were not well-reasoned and well-documented. In comparison to the evidence

Claimant previously submitted to establish the existence of pneumoconiosis, the newly submitted evidence is substantially more supportive of his claim for entitlement to benefits. Claimant has adduced the x-ray interpretation of a dually-certified physician and the narrative opinion of a physician who is board-certified in internal medicine, who both found the existence of pneumoconiosis. The newly submitted evidence also establishes that Claimant's physical condition has worsened. Employer did not proffer any new evidence to the contrary. I find that Claimant has established the existence of pneumoconiosis; an element that was previously adjudicated against Claimant. Therefore, I find that Claimant has established a material change in conditions under § 725.309(d). His duplicate claim for benefits will not be denied on the basis of the prior denial of benefits. Rather, the entire record will be reviewed *de novo* to determine if Claimant is entitled to benefits.

De Novo Review for Entitlement

As previously cited, Claimant must initially establish the existence of pneumoconiosis in order to be entitled to benefits. The newly submitted evidence establishes the existence of pneumoconiosis. However, a *de novo* review of all of the evidence must be conducted to determine if pneumoconiosis exists. Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. The record consists of 20 interpretations of 8 x-rays; 9 are positive and 11 are negative. Four of the positive interpretations were rendered in 1991. These interpretations were followed by x-rays from March and December of 1997, which I find were negative for the existence of pneumoconiosis based on the negative interpretations rendered by dually-certified physicians and B-readers in comparison to the physicians who offered positive interpretations but did not hold any credentials regarding the detection of pneumoconiosis. However, as previously cited, the Act finds that pneumoconiosis can be a latent and progressive disease. Thus, I find the more recent evidence to have more probative value. The more recent evidence consists of the December 20, 2000 x-ray and the August 12, 2002 x-ray. For the reasons stated above in the analysis of the newly submitted x-ray evidence, I find that the more recent evidence establishes the existence of pneumoconiosis. Therefore, I find that the Claimant has established the existence of pneumoconiosis by a preponderance of all x-ray evidence under subsection (a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. There is no biopsy evidence in the record to consider. Therefore, I find that the Claimant has failed to establish the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

The prior denial analyzed the narrative opinions of Drs. DeGuzman, Jarboe, and Sundaram. Drs. DeGuzman and Sundaram opined that Claimant suffered from pneumoconiosis, while Dr. Jarboe found that Claimant did not have sufficient evidence to diagnose pneumoconiosis. All three of these opinions were rendered in 1997. The opinion of Dr. Ammisetty, who opined that Claimant suffered from a severe obstructive lung disease arising in part out of Claimant's exposure to coal dust. Dr. Ammisetty's opinion is the most recent, it is well-reasoned and well-documented, and he is board-certified in internal medicine. Therefore, I find that Claimant has established the existence of pneumoconiosis under subsection (a)(4).

Claimant has established the existence of pneumoconiosis by x-ray evidence and by narrative opinion evidence. Therefore, I find that Claimant has established the existence of pneumoconiosis.

Arising out of Coal Mine Employment

In order to be eligible for benefits under the Act, Claimant must also prove that pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a). For a miner who suffers from pneumoconiosis and was employed for ten or more years in one or more coal mines, it is presumed that his pneumoconiosis arose out of his coal mine employment. *Id.* As I have found that Claimant has established 27 years, 7 months of coal mine employment, and as no rebuttal evidence was presented, I find that Claimant's pneumoconiosis arose out of his coal mine employment in accordance with the rebuttable presumption set forth in § 718.203(b).

Total Disability

To prevail, Claimant must also demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under Section 718.204(b), all relevant probative evidence, both "like" and "unlike" must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

I find that Claimant has not established that he suffers from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. The records consists of the results of 7 PFTs. Three of the studies were conducted in 1997, with one producing non-qualifying values and the other two producing results that were invalidated by Drs. Younes and Burki due to suboptimal effort. A valid PFT from 1998 did not produce qualifying results. A March 30, 1999 PFT produced qualifying results. However, a December 20, 2000 study was determined to be invalid by Dr. Burki. The most recent study, performed on February 26, 2001 did not produce qualifying values. After excluding the PFTs that were invalidated, the record then consists of non-qualifying tests performed in 1997, 1998, and 2001, compared with qualifying results produced by one test in 1999. The qualifying test result from 1999 does not list Claimant's level of cooperation and effort. As the evidence is in conflict and a majority of the studies did not produce qualifying results, I find that Claimant has not established total disability by a preponderance of the pulmonary function test evidence under subsection (b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) by the results of arterial blood gas studies. The record contains the results of 3 ABGs, all of which yielded non-qualifying results. Therefore, I find that Claimant has failed to establish the existence of total disability by a preponderance of the arterial blood gas study evidence under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. There is no medical evidence regarding a diagnosis of cor pulmonale to consider. Therefore, I find that Claimant has failed to establish the existence of total disability by a preponderance of the medical evidence under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that Miner's respiratory or pulmonary condition prevented Miner from engaging in his usual coal mine employment or comparable gainful employment.

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986). Claimant's usual coal mine employment consisted of work as a chief foreman, electrician, and machine operator. He stated that his exertional requirements varied depending upon the job he performed. If the machine he was operating stopped working, he would fix it. He had to repair electrical parts, change tires, and occasionally carry 5 pounds, crawl 280 feet, or lift 150 pounds with the aid of two other men. Claimant also had to walk the mines to supervise others work. I find that his usual coal mine employment required a moderate degree of manual labor.

In his 1997 opinion, Dr. Jarboe opined that Claimant retained the respiratory capacity to perform his last coal mining job or a job of similar effort, even though he diagnosed a mild obstructive ventilatory defect. To the contrary, Dr. Sundaram offered an opinion in 1997 that Claimant was unable to perform his usual coal mine employment due to his shortness of breath with limited exertion. Also in 1997, Dr. DeGuzman opined that Claimant could not perform his previous coal mine employment due to COPD.

In his 1999 opinion, Dr. DeGuzman offered that Claimant will never return to any kind of work "that requires physical and mental (sic)," based on Claimant's deteriorating PFT values. I infer that Dr. DeGuzman intended to state that Claimant will never return to any kind of work requiring physical and manual labor, as there is no evidence that Claimant suffers from any cognitive or mental defect. Dr. DeGuzman examined Claimant on at least two occasions and reviewed several PFTs. During his physical examination, he documented diminished breath sounds, rhonchi, and he noted that Claimant's face appeared unhealthy. Dr. DeGuzman set forth clinical observations and findings, and he relied upon adequate data to support his reasoning. His opinion is well-reasoned and well-documented. I find that his opinion is entitled to probative weight.

Dr. Ammisetty opined that Claimant did not retain the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment due to his severe obstructive pulmonary impairment. Dr. Ammisetty noted that Claimant was short of breath on minimal exertion in his office, and he detected bibasilar rales on auscultation of Claimant's lungs. He submitted Claimant to objective testing. Dr. Ammisetty set forth clinical observations and findings, and his reasoning is supported by adequate data. His opinion is well-reasoned and well-documented. Even though Dr. Ammisetty relied upon a PFT that was determined to be invalid by

Dr. Burki, the other evidence that Dr. Ammisetty relied upon is sufficient to allow his opinion to be well-reasoned and well-documented. I find that his opinion is entitled to probative weight enhanced by his board-certification in internal medicine.

Dr. Mettu, after conducting a PFT on February 6, 2001, opined that Claimant had a small airways dysfunction and a mildly decreased diffusion capacity. It is not clear if Dr. Mettu's use of the word "small" is referring to the level of Claimant's airways dysfunction, or whether it means the dysfunction is present in Claimant's small airways. The ambiguity of the word "small" limits the probative weight of Dr. Mettu's opinion to confirming the existence of a pulmonary impairment.

I find that Claimant is unable to perform the manual labor required to execute his usual coal mine employment due to his pulmonary impairment. Claimant was 58 years old at the time of the hearing, and it is clear from the medical evidence that he suffers from an obstructive ventilatory defect. Dating back to 1997, Dr. Jarboe found Claimant to be suffering from a mild obstructive defect, which was confirmed by Drs. Sundaram and DeGuzman. More recently, Dr. Ammisetty determined that Claimant's pulmonary impairment was severe. Although the PFT that Dr. Ammisetty performed was determined to be invalid by Dr. Burki, Dr. Ammisetty relied on other clinical evidence sufficient to support his opinion that Claimant's pulmonary impairment was severe. Claimant was experiencing dyspnea even with small movements in Dr. Ammisetty's office. Dr. Mettu also confirmed the existence of a defect, and noted that Claimant's diffusion capacity was also mildly decreased. Dr. DeGuzman determined that Claimant's pulmonary functioning was gradually decreasing. Claimant's usual coal mine employment requires him to perform manual labor, which includes lifting, spending time on his knees, and walking the mines. Claimant clearly suffers from an obstructive ventilatory defect that was mild in 1997 and progressively worsened by the time of the hearing. Claimant's obstructive ventilatory defect, which renders him short of breath with even small movements, prevents him from having the respiratory capacity to perform his usual coal mine employment or other comparable work in a dust-free environment. Employer has submitted no recent evidence contrary to such a finding. Therefore, I find that Claimant has established the existence of a totally disabling respiratory impairment under subsection (b)(2)(iv).

Claimant has established the existence of a totally disabling respiratory or pulmonary impairment by narrative opinion evidence, but failed to establish such a disability by pulmonary function tests or arterial blood gas studies. Three out of four valid PFTs did not produce qualifying values, and all seven ABGs revealed non-qualifying values. However, I attribute greater probative weight to the narrative opinions of physicians who diagnosed a totally disabling obstructive impairment. Accordingly, I find that Claimant suffers from a totally disabling respiratory impairment by a preponderance of all of the medical evidence. Narrative medical opinions may establish the existence of a totally disabling respiratory or pulmonary impairment, notwithstanding non-qualifying PFTs and ABGs. The physicians who found Claimant to be totally disabled due to an obstructive lung disease considered a broad range of clinical evidence, which included Claimant's subjective complaints, objective testing, and their own clinical observations. In this case, the narrative opinions are more probative because they considered a comprehensive set of evidence. Therefore, I find that Claimant has established that he is totally disabled due to pneumoconiosis under § 718.204(b)(2).

Total Disability Due to Pneumoconiosis

The amended regulations at § 718.204(c) contain the standard for determining whether Miner's total disability was caused by Miner's pneumoconiosis. Section 718.204(c)(1) determines that a miner is totally disabled due to pneumoconiosis if pneumoconiosis, as defined in § 718.201, is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition or if it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. §§ 718.204(c)(1)(i) and (ii). Section 718.204(c)(2) states that, except as provided in § 718.305 and § 718.204(b)(2)(iii), proof that the Miner suffered from a totally disabling respiratory or pulmonary impairment as defined by §§ 718.204(b)(2)(i), (ii), (iv), and (d) shall not, by itself, be sufficient to establish that the miner's impairment was due to pneumoconiosis.

Except as provided by § 718.204(d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report. § 718.204(c)(2). The Sixth Circuit Court of Appeals has stated that pneumoconiosis must be more than a "de minimus or infinitesimal contribution" to the miner's total disability. *Peabody Coal Co. v. Smith*, 12 F. 3d 504, 506-507 (6th Cir. 1997). The Sixth Circuit has also held that a claimant must affirmatively establish only that his totally disabling respiratory impairment (as found under § 718.204) was due 'at least in part' to his pneumoconiosis. *Cf*. 20 C.F.R. 718.203(a)." *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1988); *Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 218 (6th Cir. 1996)(opinion that miner's "impairment is due to his combined dust exposure, coal workers' pneumoconiosis as well as his cigarette smoking history" is sufficient). More recently, in interpreting the amended provision at § 718.204(c), the Sixth Circuit determined that entitlement is not precluded by "the mere fact that a non-coal dust related respiratory disease would have left the miner totally disabled even without exposure to coal dust." *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk}*, 264 F.3d 602 (6th Cir. 2001). A miner "may nonetheless possess a compensable injury if his pneumoconiosis materially worsens this condition." *Id*.

The reasoned medical opinions of those physicians who diagnosed the existence of pneumoconiosis and that Miner was totally disabled are more reliable for assessing the etiology of Miner's total disability. *See, e.g. Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995).

Dr. DeGuzman did not offer an opinion on the cause of Claimant's totally disabling respiratory impairment in his 1999 report. However, in 1997, Dr. DeGuzman found that Claimant's clinical pneumoconiosis was caused by coal dust exposure and his pulmonary impairment was caused by COPD and CWP. He considered a 24 year history of coal mining and a smoking history of one pack per day for 20 years. Dr. DeGuzman did not provide any explanation for his opinion that the etiology of Claimant's totally disabling respiratory impairment was smoking and coal dust exposure. He just attributed Claimant's impairment to the two risk factors for pulmonary disease that Claimant provided to him. I find that Dr. DeGuzman's opinion is entitled to a lesser degree of probative weight due to the absence of supporting rationale.

Dr. Ammisetty stated that Claimant's severe pulmonary disease was caused by cigarette smoking and occupational dust exposure. He considered a 19-21 year history of coal mine employment and 35 year history of smoking one pack of cigarettes per day. Dr. Ammisetty also failed to provide an explanation for his opinion on the etiology of Claimant's totally disabling respiratory impairment. I find that Dr. Ammisetty's opinion is entitled to a lesser degree of probative weight.

Dr. Jarboe found that Claimant did not suffer from pneumoconiosis and that Claimant was not totally disabled. He attributed Claimant's airflow obstruction to cigarette smoking based on the pattern of airflow obstruction being consistent with the type of airflow obstruction due to cigarette smoking. Dr. Jarboe found levels of carboxyhemoglobin in Claimant's blood consistent with smoking two packages of cigarettes per day, which indicates that Claimant did not quit smoking in 1991 as reported by Dr. Sundaram.[7] In 1997, Dr. Jarboe considered a coal mine employment history of 32 years of underground mining and a smoking history of one pack of cigarettes per day ending for 25 years ending in 1990 or 1991. He found that clinical pneumoconiosis did not exist based on chest x-ray evidence, and attributed Claimant's obstructive impairment and chronic bronchitis to smoking. He also opined that Claimant retained the respiratory capacity to perform his usual coal mine employment. Thus, Dr. Jarboe's opinion is predicated on medical conclusions contrary to the findings of the undersigned in this matter. His opinion is well-reasoned and well-documented. However, I attribute a lesser degree of probative weight to Dr. Jarboe's opinion because his failure to consider the existence of pneumoconiosis and a totally disabling respiratory impairment makes his opinion on the etiology of Claimant's totally disabling respiratory impairment less reliable.

After Dr. Sundaram's examination of Claimant in 1997, he opined that Claimant was totally disabled due to CWP caused by inhalation of coal dust because Claimant stopped smoking in 1990. However, Dr. Sundaram's smoking history conflicts with the smoking history determined by the undersigned and Dr. Jarboe's opinion that Claimant's carboxyhemoglobin level indicates that Claimant continues to smoke cigarettes. Therefore, I attribute a lesser degree of probative weight to Dr. Sundaram's opinion.

The record contains the opinions of four physicians on the etiology of Claimant's totally disabling respiratory impairment. None of the four are ideal for accurately determining the etiology of Claimant's impairment. Claimant must establish that his totally disabling respiratory impairment was due to his pneumoconiosis by a preponderance of the evidence. Of the four physicians' opinions, three find that Claimant's totally disabling pulmonary impairment was due to pneumoconiosis without any specific explanation, and one found that Claimant did not have pneumoconiosis, was not totally disabled, and that Claimant's obstructive lung disease was solely due to cigarette smoking. After weighing all four of the opinions in light of their respective flaws, I find that Claimant has not established that his totally disabling respiratory impairment is due to pneumoconiosis by a preponderance of the evidence. Even though Dr. Jarboe's opinion is entitled to a lesser degree of probative weight, his analysis makes it clear that there is clinical evidence that can be relied upon in determining the etiology of an obstructive pulmonary impairment. Drs.

[7]Claimant testified at the hearing in 1999 that he continued to smoke. (DX 16).

Ammisetty, DeGuzman, and Sundaram did not make any attempt to support their conclusion with findings they made during their examination. Regardless of whether the physicians attributed Claimant's respiratory impairment to smoking, CWP, or both, I would still have to find that Claimant has not met his burden. A Claimant can only establish that his totally disabling respiratory impairment is due to pneumoconiosis through a physician's reasoned and documented medical report. Therefore, I find that Claimant has not established that his totally disabling respiratory impairment is due to his pneumoconiosis under § 718.204(c).

Entitlement

The Claimant, Paul Varney, has failed to prove, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis. Therefore, Mr. Varney is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of Paul Varney for benefits under the Act is hereby DENIED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. **A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.**